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In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAMS PIPE LINE COMPANY and
EXPLORER PIPELINE COMPANY, PETITIONERS
v.
FEDERAL ENERGY REGULATORY COMMISSION, and
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The opinions and orders of the Interstate Commerce Commission[1] are reported at 351 I.C.C. 102

[1]As of October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Pub. L. No. 95-91, 91 Stat. 565 (to be codified as 42 U.S.C. 7101 *et seq.*), and Executive Order No. 12009, 42 Fed. Reg. 46267 (1977), the Federal Energy Regulatory Commission, an independent regulatory commission within the Department of Energy, succeeded "to all functions and authority of the Interstate Commerce Commission * * * where the regulatory function establishes rates or charges for the transportation of oil by pipeline or establishes the valuation of any such pipeline." Pub. L. No. 95-91, Section 402(b), 91 Stat. 584. Other functions of the Interstate Commerce Commission "relat[ing] to transportation of oil by pipeline" were transferred to the Secretary of Energy. Pub. L. No. 95-91, Section 306, 91 Stat. 581.

(Pet. App. B) and 355 I.C.C. 479 (Pet. App. C); the ICC's initial decision (Pet. App. D) is not reported.

JURISDICTION

The judgment of the court of appeals was entered June 27, 1978, and its order denying a petition for rehearing was issued July 25, 1978. The petition for a writ of certiorari was filed on August 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Section 705 of the Department of Energy Organization Act (DOE Act), Pub. L. No. 95-91, 91 Stat. 606, provides:

SAVINGS PROVISIONS

(a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges—

(1) which have been issued, made, granted, or allowed to become effective by the President, any Federal department or agency or official thereof, or by a court of competent jurisdiction, in the performance of functions which are transferred under this Act to the Department or the Commission after the date of enactment of this Act, and

(2) which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the President, the Secretary, the Federal Energy Regulatory Commission, or other authorized officials, a court of competent jurisdiction, or by operation of law.

(b)(1) The provisions of this Act shall not affect any proceedings or any application for any license, permit, certificate, or financial assistance pending at the time this Act takes effect before any department, agency, commission, or component thereof, functions of which are transferred by this Act; but such proceedings and applications, to the extent that they relate to functions so transferred, shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

(2) The Secretary and the Commission are authorized to promulgate regulations providing for the orderly transfer of such proceedings to the Department or the Commission.

(c) Except as provided in subsection (e)—

(1) The provisions of this Act shall not affect suits commenced prior to the date this Act takes effect, and,

(2) in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this Act had not been enacted.

(d) No suit, action, or other proceeding commenced by or against any officer in his official capacity as an officer of any department or agency, functions of which are transferred by this Act, shall abate by reason of the enactment of this Act. No cause of action by or against any department or agency, functions of which are transferred by this Act, or by or against any officer thereof in his official capacity shall abate by reason of the enactment of this Act.

(e) If, before the date on which this Act takes effect, any department or agency, or officer thereof in his official capacity, is a party to a suit, and under this Act any function of such department, agency, of officer is transferred to the Secretary or any other official, then such suit shall be continued with the Secretary or other official, as the case may be, substituted.

QUESTION PRESENTED

Whether the court of appeals properly remanded a decision of the Interstate Commerce Commission approving certain increased oil pipeline rates, which the court found was not supported by rational explanations of the ICC's treatment of the pipeline's rate base, rate of return, and depreciation charges, for reconsideration by the ICC's successor, the Federal Energy Regulatory Commission.

STATEMENT

In late 1971 and early 1972, Williams,[2] an oil pipeline in the Midwest regulated as a common carrier under Section 1(1)(b) of the Interstate Commerce Act, 49 U.S.C. 1(1)(b),

[2]At the time of these filings, Williams was known as Williams Brothers Pipe Line Company; its name was subsequently changed to Williams Pipe Line Company (see Pet. App. C-2 n.3). We use the name "Williams" to refer to both entities.

filed increased transportation rates with the Interstate Commerce Commission (Pet. App. A-4). At the same time, Williams and Explorer Pipeline Company filed initial "joint rates for through service from the Gulf Coast to the Midwest" (*ibid.*). A group of oil producers and refiners in the Great Plains area, who used the Williams' pipeline system to reach the Midwest, protested the rates and requested that they be suspended (*id.* at A-4 to A-5).[3] The ICC declined to suspend the rates, but ordered an investigation into the lawfulness of both Williams' rates and the Williams-Explorer joint rates (*id.* at A-5).

Following hearings and the submission of briefs, the administrative law judge issued an initial decision approving the published rates (Pet. App. D-3 to D-35). A three-commissioner division (Division 2) of the ICC affirmed, with one commissioner dissenting (Pet. App. B-1 to B-53). Then the full Commission, with one commissioner dissenting, affirmed the findings of the initial decision and those of Division 2 (Pet. App. C-1 to C-43).[4] In reaching its decisions, the ICC relied on its earlier decisions, dating from the 1940's,[5] to support its continued reliance on a valuation rate base[6] and a 10%

[3]The shippers also filed a complaint seeking reparations back to August 20, 1970 (Pet. App. D-5 to D-6).

[4]Two commissioners did not participate (Pet. App. C-34).

[5]*Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I.C.C. 41 (1944); *Petroleum Rail Shippers' Ass'n* v. *Alton & So. R.R.*, 243 I.C.C. 589 (1941); *Reduced Pipe Line Rates and Gathering Charges*, 243 I.C.C. 115 (1940), reopened, 272 I.C.C. 375 (1948).

[6]The court of appeals defined this term as follows (Pet. App. A-5 n.3):

> A valuation rate base allows the carriers to receive a return on the present "fair value" of all of its property devoted to public use. The Interstate Commerce Act, as amended by the Valuation Act, 37 Stat. 701 (1913), gives the ICC broad authority to "investigate, ascertain, and report the value of all property

return on valuation to determine that Williams' rates were just and reasonable (Pet. App. B-7 to B-11; Pet. App. C-4, C-6 to C-9, C-11 to C-13, C-18 to C-19; Pet. App. D-25 to D-29). In addition, the Commission permitted Williams to base its depreciation charges on its purchase price ($287.4 million) for an existing pipeline system on which ratepayers had already been charged approximately $91 million in depreciation (Pet. App. B-35 to B-36; Pet. App. C-14 to C-15).

After the petition for review was filed in the court of appeals, but before the ICC's brief was filed, jurisdiction over the regulation of oil pipelines was transferred from the ICC to the Federal Energy Regulatory Commission (FERC) and the Secretary of Energy pursuant to Sections 306 and 402(b) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 581, 584 (see note 1, *supra*, and Pet. App. A-3). The FERC then moved for remand of the case, but the court of appeals denied the motion pending its review of the merits (see Pet. App. A-3).

After briefing and oral argument, the court of appeals concluded that the ICC precedents from the 1940's provided little guidance for oil pipeline ratemaking (Pet. App. A-10). The court observed that those cases had apparently relied, without analysis, on the ICC's contemporary precedents concerning ratemaking for railroads (*id.* at A-11). The court noted (*ibid.*) that after the ICC had adopted the fair value method of ratemaking in oil pipeline cases, the Supreme Court, which had earlier

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owned or used by" regulated carriers, 49 U.S.C. § 19[a](a), based, *inter alia*, on "the original cost to date [of public assets], the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any." *Id.* § 19a(b).

appeared to mandate the fair value method in railroad ratemaking, had become "openly critical" of that method in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). The court pointed out the economic conditions affecting oil pipelines had changed dramatically since the 1940's (Pet. App. A-12 to A-14). Finally, the court noted that, under Section 402(b) of the DOE Act, 91 Stat. 584, the regulatory jurisdiction over oil pipelines had been transferred to the FERC, which, joined by the Antitrust Division of the Department of Justice, asked the court to remand the case (Pet. App. A-15 to A-16 & n.22).

Turning to the ICC's opinion in this case, the court found that the Commission's decisions in the 1940's and its history of using the valuation method were insufficient to justify resurrection of a method of ratemaking last considered 30 years ago in far different economic circumstances (*id.* at A-19 to A-20). The court found (*id.* at A-21) that although the ICC urged that the fair value method was necessary in an inflationary period, it had failed to consider changed economic conditions or "to assess the actual effects of inflation on Williams' ability to attract capital."

The court found that the ICC had likewise provided no rationale for adopting the same standard of a 10% return on valuation that it had applied 30 years before (*id.* at A-22). The court concluded that without an assessment of the significance of intervening economic and technological changes this aspect of the ICC's order also lacked a rational basis (Pet. App. A-22 & n.31).

Finally, the court determined (*id.* at A-23 to A-24) that the ICC had failed adequately to explain why depreciation charges should be based on the recent acquisition price of a pipeline. The ICC had stated only that such an approach accorded with its accounting rules, and that the original cost approach urged by the protestants did not keep pace with inflation (*id.* at A-23). The court noted that the Commission had previously denied that its

ratemaking practice would be controlled by its accounting procedures (*id.* at A-23 to A-24). The court further observed that reliance on recent purchase prices can result in abrupt changes in depreciation charges solely because of the fortuity of an intervening purchase, and that adjusting depreciation for inflation, after also including an inflation factor in the valuation rate base, "would seem precipitous and itself unduly inflationary" (*id.* at A-24).

Notwithstanding these deficiencies, the court recognized that it should affirm the ICC if the "end result" of its decision was proper (*id.* at A-25). The court concluded, however, that it could not find that the end result here was proper since the agency's decision did not provide a sensible explanation of how to determine the reasonableness of rates, nor did the record contain the findings that this Court held in *FPC* v. *Hope Natural Gas Co.*, *supra,* are required for an adequate basis for determining reasonableness (*id.* at A-25 and A-18 n.27). The court therefore concluded that the case should be remanded to the FERC, the successor to the ICC, for reconsideration of the reasonableness of Williams' rates under the statutory standard (*id.* at A-25 to A-26). In view of this decision, the court concluded that it was "constrained not to decide" at this time whether the Williams-Explorer joint rates created undue preferences and prejudices, inasmuch as the nature of those questions might change as a result of the proceedings and decision of the FERC on remand (*id.* at A-27 to A-28).[7]

[7]The court rejected petitioners' argument that the division of the joint rates between the two pipelines created an illegal discrimination under Section 2 of the Interstate Commerce Act, 49 U.S.C. 2, finding that the issue had not been properly raised before the ICC (Pet. App. A-28 to A-31 & n.38).

ARGUMENT

Petitioners' primary contention (Pet. 12-16) is that the court of appeals ignored the directive in Section 705 of the DOE Act, 91 Stat. 606, that the transfer of jurisdiction over oil pipeline rates to the FERC should work no substantive changes. Petitioners argue (Pet. 15-17) that the court improperly remanded the case for the FERC's reconsideration without regard for the merits of the ICC's decision.

To the contrary, the court's opinion demonstrates its careful review of the ICC's decision. The court denied the FERC's motion "to have the case *automatically* remanded to it, following the transfer of authority from the ICC," because it recognized the effect of Section 705 of the DOE Act and petitioners' "interest in the opportunity to defend the agency's original determination" (Pet. App. A-15 to A-16 & n.22; emphasis in original). The court decided to remand the case only after petitioners had "had the opportunity to defend the agency's decision before us * * * and where that defense has not removed" deficiencies in the agency's decision (*id.* at A-16 n.22).

The court found that the ICC's orders could not be sustained because they relied without explanation on outmoded and insufficient precedents governing the method of ratemaking,[8] on out-dated economic and technological

[8]The court concluded that even assuming "that valuation ratemaking might be capable of producing a viable 'end result,' there is no assurance in the Commission's 1940's precedents—born as they were of peculiar post-depression, World War II, and post-War economic conditions—that such a result will occur in the 1970's" (*id.* at A-19 to A-20). The court found that the ICC had failed to consider changes in economic conditions (*id.* at A-20) or "to assess the actual effects of inflation on Williams' ability to attract capital" (*id.* at A-21). It also noted that the ICC had abandoned valuation ratemaking for railroads, "which [are] equally subject to the Valuation Act" (*id.* at A-20 and see *id.* at A-12 n.9). And the court expressed concern

assumptions governing rate of return,[9] and on anomalous criteria governing depreciation.[10] The court also found that "the record appears to be incomplete in certain significant respects" (Pet. App. A-25).

Despite petitioners' contentions to the contrary, the court of appeals recognized, and adhered to, the limited scope of judicial review in rate cases. See Pet. App. A-25,

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that the ICC had failed to explain its reliance on its accounting rules beyond its comment that the rules were "geared to the use of a valuation rate base" (*id.* at A-19); as the court pointed out, "there is no assurance of record, at least, that reasonable accounting measures translate automatically into reasonable rates" (*id.* at A-20).

[9]The court found "the ICC's discussion of rate of return equally problematical" because "the *total* emphasis is on the 1940's precedents" (*id.* at A-22; emphasis in original). Holding that "a 'reasonable rate of return' determination must be the product of the economic moment," the court found that the ICC had failed to explain how the "complex of relevant factors [relied on in the 1940's cases] has changed in thirty years," and that it had not explained its conclusion in the light of current conditions (*id.* at A-22 & n.31).

[10]The court found that the ICC had sought to support its decision to allow Williams' depreciation charges to be based on the purchase price of the pipeline only by referring to its accounting rules and the inability of the original cost approach suggested by the shippers "to keep pace with inflated property values" (*id.* at A-23 to A-24). The court rejected "the ICC's current unexplained insistence on irrevocably hitching its ratemaking theory to its accounting rules * * * because, when it wrote those rules, the Commission expressly denied them any such controlling impact on rates" (*ibid.*). The court also expressed concern that this practice allowed depreciation charges "to change dramatically" because of a change in ownership "even though the cost of the carriers' public service has not actually changed," and that the practice might entail allowing for inflation more than once (*id.* at A-24).

citing, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 766-767 (1968). Since the ICC's orders were unsupported by its rationale, or by usable material in the public record (Pet. App. A-25), the court correctly remanded the case to the FERC, the ICC's successor, for reconsideration. See, *e.g.*, *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974).

This decision was in no way inconsistent with Section 705 of the DOE Act, 91 Stat. 606, which saves from abatement pending proceedings that are affected by jurisdictional transfers from one agency to another. Nothing in that provision reduces the authority of courts reviewing pre-DOE Act decisions to dispose of such cases on their merits and to remand them when appropriate.[11] To the contrary, Section 705(c)(2) requires disposition "in the same manner and effect as if this Act had not been enacted." Since the court's decision to remand was based on its review of the merits, that decision was properly entered as though the Act "had not been enacted."[12]

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[11]Petitioners assert (Pet. 15) that the court of appeals believed "that the transfer of jurisdiction out of the ICC in some way barred the Court from affirming that agency's regulatory approach." The portion of the opinion (Pet. App. A-16) that petitioners cite, however, merely observes that in view of the transfer of the ICC's authority to the FERC, this case could not be viewed as part of the ICC's continuing effort to develop its approach to oil pipeline rates. The court pointed out that the transfer "removes the stabilizing influence of the courts' usual desire to afford an administrative agency some latitude over time to develop its own approach to [its] regulatory tasks" (*ibid.*).

[12]Nothing in the legislative history petitioners cite (Pet. 12-16) supports a contrary view. Two of the committee reports petitioners quote (Pet. 13) simply restate the language of Section 705 and indicate that pending judicial proceedings shall continue to a decision on the merits, with the appropriate successor agency substituted. The quotations from the third committee report and from the colloquy between Senators Hansen and Ribicoff (Pet. 13-15) address only the general need for continuity in the transfer of oil pipeline regulatory functions to the FERC, and suggest no changes in what would

Petitioners also urge (Pet. 17-20) that the court's decision limits or otherwise constrains the authority of regulatory agencies to determine whether to establish ratemaking standards by adjudicatory or rulemaking proceedings.[13] But the court expressly recognized the Commission's "discretion to choose between adjudicatory or quasi-legislative means of adopting a new methodology for the future" (Pet. App. A-21 n.28). As the court pointed out, the shippers had challenged Williams' rates as unreasonable, and "section [1(5)(a)] of the Interstate Commerce Act states that no unreasonable rate may stand" (*ibid.*). Accordingly, the court was obliged to review the ICC's orders and determine whether its ratemaking was rational (*ibid.*).[14]

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otherwise be the disposition of pending judicial proceedings. See 123 Cong. Rec. S13282-S13283 (daily ed. Aug. 2, 1977).

[13]Petitioners contend (Pet. 18) that the court's opinion has a "forward-looking thrust" because it points out that Williams' reliance on the valuation methodology might require that relief be prospective only. Petitioners seek to find in this analysis implicit support for the ICC's decision to apply valuation methodology. What the court indicated, however, was simply that the FERC could, on remand, decline to order reparations because of this reliance, and thus "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939); accord, *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 311 (1974); *Natural Gas Pipeline Company of America* v. *FPC*, 128 F. 2d 481, 485-486 (7th Cir. 1942).

[14]Contrary to petitioners' assertion (Pet. 21), the issue before the court of appeals was not "the lawfulness of the ICC's *pro tempore* use of [the valuation] standard under the circumstances of this case" (*ibid.*), but the lawfulness of Williams' rates (Pet. App. A-5, A-21 n.28, A-31). The inquiry into the lawfulness of Williams' rates necessarily entailed an inquiry into the validity of the valuation standard, because that is the standard the ICC used to determine the reasonableness of the rates (*id.* at A-18 & n.27). See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548-549 (1978); *FPC* v. *Texaco Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962); SEC v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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